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Industry Information

Protection of Dissenters' Rights - Appointment Of Forensic Experts

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In the matter of Qihoo 360 Technology Co Ltd (Unreported, Mangatal J, 24 July 2017)

In a recent application made before the Grand Court of the Cayman Islands (the "**Court**"), Walkers, along with Robert Levy QC as leading counsel, has successfully argued that the Court does have the power to order the appointment of an independent forensic information technology expert to conduct a forensic information technology audit of a party's discovery in proceedings commenced under section 238 of the Companies Law (2016 Revision) (the "**Law**" and "**Fair Value Proceedings**"), provided the circumstances of the case are exceptional.

In this case, the dissenting shareholders, which are all funds managed by Hong Kong based fund manager Maso Capital (the "**Dissenters**"), had their shares cancelled as part of a management buy-out that was completed by way of statutory merger under Part XVI of the Law and exercised their statutory right to dissent from the merger. In the first case of its kind in Fair Value Proceedings, the Court was asked, *inter alia*, in a contested matter to order that Qihoo 360 Technology Co. Ltd. (the "**Company**") and the Dissenters jointly appoint an independent forensic technology expert to conduct an audit of the Company's information technology systems and electronic devices to ascertain the Company's compliance with its discovery obligations.

Mangatal J. held, after considering various authorities, that "*this Court does have the inherent jurisdiction to order discovery to be carried out by a forensic information technology expert who will perform a forensic audit. It is also in keeping with the overriding objective of dealing with cases justly, in a way which is proportionate to the amount of money involved, the importance of the case, and the complexity of the issues, to give that flexible interpretation to the GCR set out in Order 24 as to discovery*" [110].

Mangatal J. considered that the case was an 'exceptional' one, "*not only because of the central importance of discovery in section 238 proceedings and the Company's role in the process, but also because of the Company's inconsistent and cavalier approach to discovery resulting in insufficient discovery under previous orders*" [112].

As such, Mangatal J. confirmed that "*the circumstances of the case warrant the Court granting orders in relation to the appointment of a forensic expert to carry out a forensic audit. This is necessary to avoid a denial of justice to the Dissenters, as well as to allow the Court to properly carry out the function which it will have to carry out at the end of the day, namely appraising the fair value of the Dissenting Shares. Whilst the Order is undoubtedly intrusive, it is justified in this case*" [113].



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